

FILE COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1937.

No. _____ ORIGINAL.

THE STATE OF OKLAHOMA, UPON THE RELATION OF HOWARD
C. JOHNSON, BANK COMMISSIONER, *Plaintiff,*

v.

R. M. COOK, *Defendant.*

**MOTION FOR LEAVE TO FILE COMPLAINT
AND COMPLAINT.**

FRANCIS C. BROWN,
HOUSTON E. HILL,

*Attorneys for the State of Ok-
lahoma Upon the Relation of
Howard C. Johnson, Bank
Commissioner, Plaintiff.*

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v.

R. M. COOK, *Defendant*.

MOTION FOR LEAVE TO FILE COMPLAINT.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Now comes the State of Oklahoma upon the Relation of Howard C. Johnson, Bank Commissioner of the State of Oklahoma, and moves the Court for leave to file the appended complaint against R. M. Cook, citizen of another State than the plaintiff. The appended complaint presents a controversy of a civil nature arising between a State and a citizen of another State for the enforcement of the statutory liability of the defendant, arising out of the insolvency of a bank organized under the laws of the State of Oklahoma in which the defendant was and is a shareholder.

In the month of October, 1936, plaintiff commenced an action in the District Court of the United States for the

Western Division of the Western District of Missouri against the defendant for the recovery of the claim here involved and on motion of the defendant the Court dismissed the complaint for want of jurisdiction on the ground that the State of Oklahoma was the real party in interest, was suing in its sovereign capacity and could not for these reasons maintain its action in the United States District Court. A copy of the Court's memorandum opinion upon the motion to dismiss is attached hereto as Exhibit B and incorporated herein by reference.

In an action heretofore brought by plaintiff against the defendant in the Circuit Court of Jackson County in the State of Missouri for the enforcement against the defendant of the liability here in suit, the Court ruled that the plaintiff could not recover upon evidence showing (1) the provisions of the Oklahoma law hereinbefore set forth, and (2) the finding of the Bank Commissioner that the bank was insolvent, but must show the actual cash value of the assets in the bank at the time it was closed and that such assets were insufficient to pay its liabilities and that the collection of the added liability of shareholders, including defendant, was necessary to provide for the payment of such liabilities. The production of such evidence, under the Court's ruling, would have required a detailed appraisal of each asset owned by the bank and substantiation of all steps taken in the liquidation by the Bank Commissioner, and as the cost of producing such evidence would have rendered the proceeding fruitless, the plaintiff dismissed the action without prejudice and therefore seeks to enforce its claim by this original action in this Court.

FRANCIS C. BROWN,
HOUSTON E. HILL,

*Attorneys for the State of Oklahoma
Upon the Relation of
Howard C. Johnson, Bank
Commissioner, Plaintiff.*

EXHIBIT B.

In the District Court of the United States for the Western
Division of the Western District of Missouri

No. 9607.

STATE OF OKLAHOMA upon the relation of HOWARD C. JOHNSON, *Plaintiff*,

v.

R. M. COOK, *Defendant*.

MEMORANDUM OPINION ON MOTION TO DISMISS.

This is a suit by the State of Oklahoma at the relation of its bank commissioner, Howard C. Johnson, to enforce a double liability or superadded liability on the stock of a bank in process of liquidation after failure.

It appears from the statute law of Oklahoma that, in cases of banks in liquidation, the commissioner on behalf of the state is charged with the responsibility of collecting the assets of such banks and then disbursing them to creditors in accordance with their rights. The bank commissioner has brought suit in this court to collect the liability assessed on stock owned by the defendant.

It is the contention of the defendant that this is a suit by the State of Oklahoma and since it is not a person there is no such diversity of citizenship as to confer jurisdiction on this court.

The only inquiry, therefore, is whether the State of Oklahoma is the real party in the case.

1. As said in *Ex Parte State of New York No. 1*, 256 U. S. 490, l. c. 500:

“As to what is to be deemed a suit against a State, the early suggestion that the inhibition might be confined to those in which the State was a party to the record * * * has long since been abandoned, and it is now established that the question is to be determined not by the mere names of the titular parties but by the

essential nature and effect of the proceeding, as it appears from the entire record.”

2. Moreover, as and for another postulate to a decision of this case, it was held in *Sim v. Edenborn*, 242 U. S. 131, l. c. 135:

“that, as to doctrines of commercial law and general jurisprudence, the former (Federal courts), exercise their own judgment, ‘But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt.’ ”

The question here does not involve any doctrines of commercial law and general jurisprudence. It becomes, therefore, the duty of the court to ascertain what construction has been placed upon the rights and duties of the bank commissioner of the State of Oklahoma by the courts of that state.

3. Prior to the construction of a statute of a state by its highest authority, the Federal court in a proper case will put its own construction upon such statute. It is not required that this be done in the case at bar for the reason that the relationship of the bank commissioner to the State of Oklahoma has been defined by numerous Oklahoma decisions.

By the sharply divided court in *Lankford et al. v. Platte Iron Works*, 235 U. S. 461, the Supreme Court held even in advance of a decision by the courts of the State of Oklahoma that a similar suit by the bank commissioner was on behalf of the state and that the state in fact was the real party in interest.

4. It is contended by the plaintiff that the decisions holding the state to be a party in similar suits was occasioned by the fact that the State of Oklahoma administered on behalf of bank depositors a guaranty fund. Such fund did not

belong to the state in the sense that it was a part of the state's revenue, but was simply administered by the state for the benefit of bank depositors. It was rather a possessory right.

Such decisions were not put upon the ground of the ownership or control of the fund, but purely upon the basis of the administrative agency of the state. This was the course of a decision in the *Lankford case*, *supra*.

In discussing the case of *Murray v. Wilson Distilling Co.*, 213 U. S. 151 in the *Lankford case*, the Court said by way of analogy:

“A duty, therefore, was imposed upon the commission to collect the assets of the dispensary and pay its debts and it was as directly expressed as was the duty imposed upon the Banking Board in the pending case.” (l. c. 472.)

5. In the following Oklahoma cases the Supreme Court of that state has held that the state was the real party in suits of a like nature: *Lovett et al. Creek County Commissioner v. Lankford, State Bank Commissioner*, 47 Okla. 12; *Bailey v. Lankford, Bank Commissioner*, 54 Okla. 692.

6. Moreover, in many other cases the Supreme Court of Oklahoma has held that where the state was seeking to collect the assets of closed banks, through the bank commissioner, the statute of limitations would not run because the state in its sovereign capacity was a party. It is so held in *State ex rel. Freeling v. Smith*, 77 Okla. 274; *State v. Ware*, 82 Okla. 130; *State etc. v. McLaughlin, Adm'r*, 159 Okla. 4; *Yeargain v. Shull, Bank Comm'r*, 149 Okla. 211.

7. Since the repeal of the guaranty fund law, the Supreme Court of Oklahoma has adhered to its ruling by holding in *Richard v. State of Oklahoma, ex rel Barnett, Bank Comm'r*, 176 Okla. 537, that the state, being a party, the statute of limitations would not run.

8. It is not necessary to cite authorities to the effect that the state is not a person within the purview of the national constitution conferring jurisdiction upon the Federal courts. The following authorities support the proposition: *Postal Telegraph & Cable Co. v. State of Alabama*, 155 U. S. 482; *Porto Rico v. Russell & Co.*, 288 U. S. 476; *City Bank Farmers Trust Co. v. William A. Schnader, etc.*, 291 U. S. 24. The same rule was announced in *Cargile, et al. v. New York Trust Co.*, 67 Fed. (2d) 585.

The State of Oklahoma, being the real party in interest, it cannot maintain its suit in the Federal court because of the lack of diversity of citizenship. Accordingly, the petition will be dismissed for want of jurisdiction. It is so ORDERED. Exception allowed to plaintiff.
Kansas City Missouri, January 29, 1937.

ALBERT L. REEVES,

United States District Judge.

UNITED STATES OF AMERICA,

Western District of Missouri, ss:

I, A. L. Arnold, Clerk of the United States District Court in and for the Western District of Missouri, do hereby certify that the annexed and foregoing is a true and full copy of the original Memorandum Opinion on Motion to Dismiss in the case of *State of Oklahoma* upon the relation of *Howard C. Johnson, v. R. M. Cook*, No. 9607, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Kansas City this 6th day of October, A. D. 1937.

A. L. ARNOLD,

Clerk.

(Seal)

By E. O'KEEFE,

Deputy Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. ——— ORIGINAL

THE STATE OF OKLAHOMA, UPON THE RELATION OF HOWARD
C. JOHNSON, BANK COMMISSIONER, *Plaintiff*,

v.

R. M. COOK, *Defendant*.

COMPLAINT.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The plaintiff, State of Oklahoma, upon the Relation of Howard C. Johnson, its duly appointed, qualified and acting Bank Commissioner, brings this action against the defendant, R. M. Cook, a citizen of the State of Missouri, and for cause of action alleges:

I.

The plaintiff, State of Oklahoma, is one of the States of the United States of America. Howard C. Johnson, on whose relation the State of Oklahoma appears herein, is the duly appointed, qualified and acting Bank Commis-

sioner of the State of Oklahoma. The defendant, R. M. Cook, is a citizen and resident of the State of Missouri and the Western Judicial District thereof.

II.

This is a case or controversy of a civil nature between a State and a citizen of another State. The nature of the action is to recover the statutory or additional liability of the defendant, R. M. Cook, for the amount of stock owned by him as a shareholder of an insolvent bank organized under the laws of the State of Oklahoma.

III.

At all times herein mentioned it was, and now is, the law of the State of Oklahoma that when the Bank Commissioner of the State of Oklahoma takes possession of a bank organized under the laws of the State of Oklahoma and its assets, and proceeds to wind up its affairs and enforce the personal liability of its stockholders, officers and directors, the acts of the Bank Commissioner are the acts of the State of Oklahoma in its sovereign capacity and that the acts of the State of Oklahoma in respect to the liquidation of insolvent banking corporations organized under the laws of the State of Oklahoma are acts in its sovereign capacity, and that title to the assets of a bank organized under the laws of Oklahoma vests in the state upon the insolvency of the bank.

IV.

The provisions of the Constitution and Statutes of the State of Oklahoma hereinafter set forth were the law in the State of Oklahoma at all times herein mentioned and this action is prosecuted pursuant to such provisions, to wit:

Article 14, Section 1, Oklahoma Constitution:

“General laws shall be enacted by the legislature providing for the creation of a Banking Department, to be under the control of a Bank Commissioner, who

shall be appointed by the Governor for a term of four years, by and with the consent of the Senate, with sufficient power and authority to regulate and control all State Banks, Loan, Trust and Guaranty Companies, under laws which shall provide for the protection of depositors and individual stockholders."

Section 9147, Oklahoma Statutes 1931:

"The Governor shall appoint, by and with the advice and consent of the Senate, a Bank Commissioner, who has been a tax payer for three years prior to appointment and who shall hold office for a term of four years, and until his successor is appointed and qualified."

Section 9130, Oklahoma Statutes 1931:

"The shareholders of every bank organized under this article shall be additionally liable for the amount of stock owned, and no more."

Section 9170, Oklahoma Statutes 1931:

"A bank shall be deemed to be insolvent; first, when the actual cash market value of its assets is insufficient to pay its liabilities; second, when it is unable to meet the demands of its creditors in the usual and customary manner; third, when it shall fail to make good its reserve as required by law."

Section 9172, Oklahoma Statutes 1931:

"Whenever any bank or trust company organized or existing under the laws of this State shall voluntarily place itself in the hands of the bank commissioner, or, whenever any judgment shall be rendered by a court of competent jurisdiction, adjudging and decreeing that such bank or trust company is insolvent, or whenever its rights or franchises to conduct a banking business under the laws of this State shall have been adjudged to be forfeited, or whenever the bank commissioner shall become satisfied of the insolvency of any such bank or trust company, he may, after due examination of its affairs, take possession of said bank or trust company and its assets, and proceed to wind up its affairs and enforce the personal liability of the stockholders, officers, and directors."

Section 9173, Oklahoma Statutes 1931, in part: .

“* * * The Bank Commissioner shall have power and authority to institute and prosecute all suits necessary for the liquidation of the assets of the insolvent corporations taken over by him and such suits shall be brought in the name of the State of Oklahoma, on the relation of the Bank Commissioner. If, after the liquidation of such insolvent corporation, wherein the depositors and creditors of said insolvent corporation shall have been paid in full, there remain in the hands of the Bank Commissioner any assets, such remaining assets shall revert to the stockholders of said insolvent corporation. Nothing in this amendment shall operate to deprive the State of Oklahoma of any lien that it may have on the assets of any bank that may have been adjudged insolvent prior to the passage and approval of this Act.”

Section 9174, Oklahoma Statutes 1931:

“On taking possession of the property of any bank, the Bank Commissioner shall forthwith give notice of such fact to all banks, trust companies and individual firms or persons holding or in possession of its assets. No bank, trust company, savings bank, firm or individual, knowing of such taking possession by the Bank Commissioner or notified as aforesaid, shall have a lien or charge for any payment, advance or clearance thereafter made, or liability thereafter incurred against any of its assets. Such bank may, with the consent of the Bank Commissioner, resume business upon such conditions as may be approved by him. Upon taking possession of the property and business of such bank the Commissioner is authorized to collect money due it and do such other acts as are necessary to conserve its assets and business and shall proceed to liquidate the affairs thereof, as hereinafter provided. The Commissioner shall collect all debts due and claims belonging to it and, upon the order of the District Court of the County in which it is doing business may sell or compound all bad or doubtful debts and, on like order, may sell all its real and personal property on such terms and at public or private sale, as the Court shall direct and

shall enforce the liabilities of stockholders of such bank. The stockholders' liability of such bank shall become due and payable upon the date of the taking possession of the property of any such bank by the Bank Commissioner, and the order of the Bank Commissioner finding the bank to be insolvent shall be conclusive evidence of that fact and the liability of said stockholders shall bear interest at the rate of six (6%) per cent per annum, from the date of the taking possession of the property of such bank by the Bank Commissioner."

V.

Pursuant to law, on or about May 22, 1931, C. G. Shull, who then was the duly appointed, qualified and acting Banking Commissioner of the State of Oklahoma, caused an examination to be made of the affairs of the Osage Bank of Fairfax, Osage County, State of Oklahoma, from which he became satisfied and determined that the bank was insolvent; on said date he made an order finding the bank to be insolvent and took possession of the bank and its assets for the purpose of liquidating the same, and proceeded to wind up its affairs and enforce the personal liability of its stockholders, officers and directors and to pay its creditors and depositors, the bank having been organized under the laws of the State of Oklahoma. A copy of the order of the Bank Commissioner finding and adjudging the bank to be insolvent, as hereinbefore set forth, is attached hereto as Exhibit A and made a part hereof by reference.

VI.

On the 22nd day of May, 1931, the said Osage Bank of Fairfax was, and at all times since has been, insolvent in that (1) its liabilities to its depositors and creditors exceeded the actual cash value of its assets by a substantial margin and (2) it was, and at all times since has been unable to meet the demands of its creditors in the usual and customary manner.

VII.

On May 22, 1931, the day on which the Bank Commissioner took possession of the said Osage Bank of Fairfax and its assets and proceeded to wind up its affairs, as hereinbefore set forth, the defendant, R. M. Cook, was the owner of sixty-nine (69) shares of the capital stock of said bank, each share being of the par value of One Hundred Dollars (\$100). The ownership of said shares of stock was evidenced by a certificate issued by said bank to the defendant, R. M. Cook, to wit, certificate No. 32, which at said time was, and at all times since has been, in the possession of the defendant. By reason of the premises, on May 22, 1931 defendant, as a shareholder of the bank, became, and at all times since has been, liable to the State of Oklahoma upon the relation of its Bank Commissioner in the sum of Sixty-nine Hundred Dollars (\$6900), together with interest thereon from May 22, 1931 until paid, at six (6%) per cent per annum, the rate prescribed by law of the State of Oklahoma.

VIII.

Immediately after taking possession of the said bank and its assets C. G. Shull, who was then the duly appointed, qualified and acting Bank Commissioner of the State of Oklahoma, made demand upon the defendant for payment of his liability as a shareholder of the bank, to wit, the sum of Sixty-nine Hundred Dollars (\$6900). Thereafter, to wit, during the month of September, 1931, the defendant paid the Bank Commissioner the sum of Twenty-three Hundred Dollars (\$2300) in partial satisfaction of his liability and the balance in the sum of Forty-Six Hundred Dollars (\$4600), together with interest thereon at the rate of six per cent (6%) per annum from May 22, 1931, until paid, remains due, owing and unpaid, and although plaintiff has made frequent demands upon the defendant for payment thereof, the defendant has failed, neglected and refused to pay the same.

IX.

The law of Oklahoma imposing the said additional liability upon shareholders was in effect at the time, and at all times since, the defendant became the holder of the shares of stock of the Osage Bank of Fairfax, herein referred to.

X.

All acts of the Bank Commissioner in connection with such liquidation have been taken with the approval and under the direction of the District Court of Osage County, State of Oklahoma, as provided by law. The Bank Commissioner has liquidated all of the assets of the bank which came into his possession, save and except the claim here in suit and certain other claims against other shareholders. The proceeds thus derived, after deduction of lawful expenses, have been paid over to the depositors and creditors of the bank in the form of dividends aggregating ninety-one per cent (91%) of the face amount of their claims. The enforcement of the claim against the defendant for the amount of his statutory additional liability as a shareholder of the bank is necessary for the further payment of claims of depositors and creditors of the bank, as the assets of the bank at all times herein mentioned were and are insufficient to pay its liabilities.

WHEREFORE, Plaintiff prays judgment against the defendant, R. M. Cook, in the sum of Forty-six Hundred Dollars (\$4600), together with interest thereon at the rate of six

per cent (6%) per annum from May 22, 1931, until paid, and for costs herein incurred.

FRANCIS C. BROWN,
HOUSTON E. HILL,

Attorneys for the State of Oklahoma Upon the Relation of Howard C. Johnson, Bank Commissioner, Plaintiff.

UNITED STATES OF AMERICA,
STATE OF OKLAHOMA,
County of Oklahoma, ss:

Howard C. Johnson, having been first duly sworn upon oath, says: I am the Bank Commissioner of the State of Oklahoma and as such have authority to file in its name and on its behalf in the Supreme Court of the United States, the foregoing complaint and motion for leave to file the same. I am familiar with the averments contained in such complaint, and according to my information and belief, such averments are true in all respects.

HOWARD C. JOHNSON.

Subscribed and sworn to before me this 8th day of November, 1937.

(Notarial Seal)

VARVEL ROBERTSON,
Notary Public for the State of Oklahoma, County of Oklahoma.

My commission expires July 27, 1939.

EXHIBIT A.

STATE OF OKLAHOMA,
County of Oklahoma, ss.

ORDER.

In the office of the State Bank Commissioner in and for the State of Oklahoma. In re OSAGE Bank of FAIRFAX, Oklahoma. Now, on this 22nd day of May, 1931, the attention of the Bank Commissioner of the State of Oklahoma is called to the condition of the OSAGE Bank of FAIRFAX, Oklahoma.

And thereupon, after considering the recommendations of a duly appointed Assistant Bank Commissioner, who has examined the affairs of said bank, and being familiar with the conditions of said bank, I am of the opinion that said bank should be closed and its books, records and assets be taken charge of by me as Bank Commissioner of Oklahoma, as provided by law, for the following reasons, to-wit:

1. That said bank is unable to meet the demands of its creditors in the usual and customary manner.
2. That the actual cash market value of its assets is insufficient to pay its liabilities.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED, by me as Bank Commissioner of the State of Oklahoma, that the OSAGE Bank, of FAIRFAX, Oklahoma, be and the same is hereby ordered closed forthwith; and I hereby take charge of all the books, records and assets of every kind and character belonging to said bank; and I further direct and order that W. E. CLARK, a duly appointed and acting Assistant Bank Commissioner, shall immediately take charge of said bank; that he shall forthwith post a notice on the front door of said bank, which notice shall be as follows:

May 22, 1931 (Date)

"This bank is in the hands of the State Bank Commissioner."

(signed) C. G. SHULL

"Bank Commissioner".

That he shall retain charge and custody of said bank and its books, records and assets, subject to my further orders. And it is further ordered that said Assistant Bank Commissioner shall prepare and file in this office, a complete and detailed liquidation report covering the condition and affairs of said bank, as soon as the same can be compiled.

WITNESS my hand and official seal this 22nd day of May, 1931.

(signed) C. G. SHULL,

Bank Commissioner.

ANSWER TO RULE
TO SHOW CAUSE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. _____ Original.

THE STATE OF OKLAHOMA, UPON THE RELATION OF HOWARD C. JOHNSON, BANK COMMISSIONER, PLAINTIFF,

VS.

R. M. COOK, DEFENDANT.

ANSWER TO RULE TO SHOW CAUSE.

R. B. CALDWELL,
LYNN WEBB,
JOHN W. OLIVER,

Attorneys for Defendant.

BLATCHFORD DOWNING,
Of Counsel.

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Supreme Court of the United States

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VS.

R. M. COOK, DEFENDANT.

ANSWER TO RULE TO SHOW CAUSE.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Comes now R. M. Cook, defendant, appearing pursuant to the rule to show cause issued herein February 14, 1938, and as and for cause why leave should not be granted to file the Complaint, states that the alleged cause of action is not one in which a State is a party, within the meaning of Article III, Section 2, of the Constitution, conferring original jurisdiction upon this court. The Complaint asserts a cause of action for the benefit of individuals who are creditors and depositors of an

insolvent state bank. Plaintiff does not seek to assert a cause of action in her sovereign or essential governmental capacity, or for her own benefit, or to recover for any alleged injury or damage sustained in any such capacity.

As supplementary to the incomplete history of the instant litigation contained in plaintiff's motion for leave to file Complaint and Complaint, defendant states that plaintiff brought suit October 13, 1934, on the cause of action alleged in the case at bar, against defendant in the Circuit Court of Jackson County, Missouri. The following judgment indicates the disposition of this case made in the aforementioned court, May 26, 1936:

"State of Oklahoma on the Relation of W. J. Barnett, Bank Commissioner, Plaintiff, vs. R. M. Cook, Defendant. No. 435802.

Now on this day, by leave of court, plaintiff amends petition in the caption by substituting the name of Howard C. Johnson in lieu of W. J. Barnett herein.

Now on this day this cause coming on regularly for trial, comes plaintiff in person and by attorney and defendant appears in person and by attorney and to try the issues herein joined comes the following jury, to-wit: (jurors' names omitted) twelve good and lawful men from the body of the county, who were duly impaneled, tried and sworn; and the hearing of the evidence is begun and at the conclusion of the evidence on behalf of the plaintiff, plaintiff by attorney, in open court, dismisses this cause without prejudice.

Wherefore, it is ordered and adjudged by the court that this cause be and the same is hereby dismissed without prejudice and that the defendant

go hence and have and recover of and from said plaintiff his costs herein incurred and expended and have therefor execution."

Thereafter, about August, 1936, plaintiff again sued defendant on the same cause of action in the District Court of the United States for the Southern Judicial District of California. There the venue as to the defendant as directed by Section 51 of the Judicial Code (28 U. S. C. A. 112) was improperly laid and said court sustained defendant's motion to quash service.

Thereafter, October 21, 1936, the plaintiff again sued defendant on the same cause of action in the District Court of the United States for the Western Judicial District of Missouri. There the defendant moved to dismiss the cause because no diversity of citizenship existed, as plaintiff alleged in its complaint as the ground upon which the jurisdiction of that court depended. The court sustained said motion to dismiss "because of the lack of diversity of citizenship." There was no appeal.

Summarizing the history of the litigation: Plaintiff has heretofore invoked the jurisdiction of the Circuit Court of Jackson County, Missouri, which clearly had and could now have jurisdiction. There was a trial on the merits in said circuit court. Plaintiff failed to make a case. When that court so indicated, plaintiff dismissed. Instead of perfecting an appeal from the circuit court's ruling, if it felt aggrieved, plaintiff elected to next sue in the federal district court in California where there was no venue; then in the federal district court in Missouri where it failed to allege jurisdictional grounds sufficient

to confer jurisdiction. *Postal Telegraph & Cable Co. v. State of Alabama*, 155 U. S. 482. Plaintiff now seeks to invoke the exercise of original jurisdiction here which, we respectfully submit, may not be properly invoked, for reasons first above stated and next hereinafter discussed.

Plaintiff's motion and Complaint depend upon Article III, Section 2 of the Constitution, for jurisdictional ground, alleging that a case or controversy between a state and a citizen of another state, is presented. This alone may not form a basis for exercise of this court's original jurisdiction. If deemed the practical equivalent of an allegation that this is a case in which a state is "a party," the facts negative the truth of the allegation when the proper meaning of "a party" is considered.

It is a settled rule that in order for a state to invoke the original jurisdiction of this court, there must be present a suit "by a state for an injury to it in its capacity of quasi sovereign." *Georgia v. Tennessee Cooper Co.*, 206 U. S. 230; *North Dakota v. Minnesota*, 263 U. S. 365; and cases cited therein. "The threatened invasion of its rights must be of serious magnitude and it must be established by clear and convincing evidence." *New York v. New Jersey*, 256 U. S. 296.

In the case at bar, the State of Oklahoma does not seek to recover for any injury or damage in her sovereign or governmental capacity, but is seeking to enforce a statutory cause of action to recover money for the benefit of individuals who are depositors and creditors of the Osage Bank of Fairfax, Osage County, Oklahoma. The State has not been damaged in any sense of the word.

In the event recovery is realized in the case at bar, plaintiff in its governmental capacity will not realize any of the fruits of this litigation. Under the statutes of Oklahoma, it may maintain this action for the depositors and creditors of insolvent banking institutions, and "after the liquidation of such insolvent corporation wherein the depositors and creditors of said insolvent corporation shall have been paid in full, there remain in the hands of the bank commissioner any assets, such assets shall revert to the stockholders of said insolvent corporation." Section 9173, Oklahoma Statutes, 1931.

The face of the complaint reveals who the beneficial parties to the cause of action asserted are. Said complaint states, "The bank commissioner has liquidated all of the assets of the bank which came into his possession, save and except the claim here in suit, and certain other claims against other shareholders. The proceeds thus derived, after the deduction of lawful expenses, have been paid over to the depositors and creditors of the bank in the form of dividends aggregating ninety-one per cent (91%) of the face amount of their claims." The enforcement of the claim against the defendant for the amount of his statutory additional liability as a shareholder of the bank is necessary for the further payment of claims of depositors and creditors of the bank as the assets of the bank at all times herein mentioned were and are insufficient to pay its liabilities."

The courts of Oklahoma have held that the governor has not the right to make the State a party to litigation enforcing the statutory causes of action provided for in the Oklahoma banking laws, although he is, under the

Oklahoma law, the supreme executive authority of that State. The only proper party plaintiff in enforcing said causes of action is "State of Oklahoma on the relation of the Bank Commissioner." *State ex rel. Murray, Governor, et al. v. Pure Oil Co.*, 169 Okla. 507, 37 Pac. (2d) 608; *Reeves v. Noble*, 88 Okla. 179, 212 Pac. 995. The statutory stockholders' liabilities are "designed solely for the benefit of creditors and constitute a fund available only when the bank is insolvent, and thus unable to meet its liabilities in full * * * it amounts, for all practical purposes, to a reserve or trust fund * * *." *State ex rel. Mothersead, Bank Com'r, v. Kelly*, 141 Okla. 36, 284 Pac. 65; *American Exchange Bank of Henryetta v. Rowsey*, 144 Okla. 172, 289 Pac. 726; *Griffin v. Brewer*, 167 Okla. 654, 56 Pac. (2d) 840.

The assets of insolvent banking institutions are liquidated "for the benefit of certain members of the public who were depositors in such institutions." *Richison, Adm'r, v. State ex rel. Barnett, Bank Com'r*, 176 Okla. 537, 56 Pac. (2d) 840.

It is plain that the beneficial parties to the cause of action asserted herein, are the depositors and creditors of the Bank of Osage.

It may be conceded that the State of Oklahoma, upon the relation of the bank commissioner, is, under the law of Oklahoma, a necessary party plaintiff. This fact, however, does not confer original jurisdiction upon this court.

"The mere fact that a state s plaintiff is not enough." *Florida v. Mellon*, 273 U. S. 12.

"We are of the opinion that the words in the Constitution conferring original jurisdiction on this court in a

suit 'in which a state shall be a party' are not to be interpreted as conferring such jurisdiction in every cause in which the state elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers generally." *State of Oklahoma v. Atchison, Topeka & Santa Fe Railroad Co.*, 220 U. S. 277.

Nor can the State of Oklahoma assert that she has a governmental or sovereign interest involved in the case at bar, because of her statutes, as *parens patriae* or as a representative of a group of its citizens. *Louisiana v. Texas*, 176 U. S. 1; *North Dakota v. Minnesota*, 263 U. S. 365, wherein this distinction is apparent; this court therein refused jurisdiction of the claim of North Dakota for damages to the land of a group of its individual inhabitants. *Kansas v. United States*, 204 U. S. 331.

In *New Hampshire v. Louisiana*, and *New York v. Louisiana*, 108 U. S. 76, a similar factual situation was presented. New Hampshire and New York, by virtue of statutes passed by the respective States, had acquired title to causes of action against defendant Louisiana. The beneficial parties to this litigation, had it been successful, would have been the former holders of the bonds which they owned and had assigned to New Hampshire and New York. This court denied jurisdiction because, although New Hampshire and New York had legal title to the causes of action, they did not have sufficient beneficial interest in said causes of action to entitle them to invoke the original jurisdiction of this court.

South Dakota v. North Carolina, 192 U. S. 286, illustrates a factual situation wherein the beneficial interest in the cause of action was vested in South Dakota, and accordingly the jurisdiction of this court was properly invoked. But in the case at bar, the situation is comparable to the New Hampshire and New York cases, *supra*, because the beneficial interest in this cause of action is in the individual depositors and creditors of the Osage Bank.

It may not be urged in this case that because the State of Oklahoma acquired title to the cause of action herein by virtue of statutory enactments within the police power of Oklahoma that this in and of itself is sufficient to entitle her to invoke the original jurisdiction of this court. There is no inconsistency in holding that the State of Oklahoma acquired her title in this manner and holding that she has no right to invoke the original jurisdiction of this court because she is not seeking to protect a governmental prerogative of its sovereignty. This is illustrated by a series of cases construing the liquor dispensary law of the State of South Carolina. In *Vance v. W. A. Vandercook*, 170 U. S. 438, the right of South Carolina to control the sale of liquor by a state controlled dispensary system was sustained as being within her police power. In *Murray v. Wilson Distillery Co.*, 213 U. S. 151, it was held that an action against the officers of the state dispensary commission was an action against the State of South Carolina. In *South Carolina v. United States*, 199 U. S. 437, it was held that a tax upon the agents of the State who were dispensing the

liquor under the dispensary laws, was not a tax against the State within the constitutional prohibition forbidding the federal government's taxing a State governmental function. The necessary inference from this latter case is that, although South Carolina, for procedural purposes, was a necessary party to any such litigation, within the meaning of the 11th Amendment, it was not exercising a governmental function within the meaning of the Constitution. Applying this analogy to the case at bar, it may be said that Oklahoma is a necessary party plaintiff upon the relation of the bank commissioner, but that because she is not the beneficial owner of the asserted cause of action and is not entitled to the proceeds thereof, if any, she is not asserting a cause of action in her governmental or sovereign capacity and therefore stands without status as "a party" within the meaning of Article III, Section 2 of the Constitution.

This is an ordinary lawsuit in which the parties are entitled to a jury trial. If Oklahoma were deemed "a party" in this case, within the meaning of the second paragraph of Article III, Section 2 of the Constitution, the effect would be to convert this court into a *nisi prius* court for jury trials of every controversy involving the liquidation of insolvent state banks, insurance companies, building and loan associations, and similar institutions, in which minor officials of a state see fit to invoke the jurisdiction. The facility of bringing individual defendants from all over the nation to the bar of this court to defend such cases obviously would invite petty officials of states to invoke such jurisdiction, were it declared to exist.

February 28, 1938, in *Helvering v. Therrell*, and companion cases (Nos. 128, 129, 287 and 597) it was said by this court: “* * * the inferred exemption from federal taxation does not extend to every instrumentality which a state may see fit to employ. Exemption depends upon the nature of the undertaking; it is cabined by the reason which underlies the inference.”

By the same process of reasoning it should be ruled, if it has not been heretofore squarely decided—for paraphrase the language of the cases last above cited—that the original jurisdiction of this court does not extend to every case which a State may undertake to file here, nor to cases in which she seeks to recover money for the benefit of individuals and in which she has no interest whatever in her essential governmental capacity. Original jurisdiction depends upon the nature of the asserted cause of action; it is cabined by the reason which underlies the constitutional provision in question. The underlying reason was to provide a forum for an action by a State in her sovereign capacity, such as for redress of injury to her settlement of boundary disputes, water rights as between states, and the like. It was never contemplated or intended that this court should be made a *nisi prius* forum for trial of controversies such as arise out of liquidation of insolvent banks by a bank commissioner or liquidating agent or other official acting in the name of the State but for the benefit of others. The very absence of precedent for such a suit as plaintiff seeks to bring here, strongly indicates the lack of right so to do.

Wherefore, defendant prays the court to deny plaintiff's motion for leave to file Complaint.

Respectfully submitted,

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